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## Common Law Pleading Modified Versus The Federal Rules: III. Counterclaims

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## COMMON LAW PLEADING MODIFIED VERSUS THE FEDERAL RULES\*

MARLYN E. LUGAR\*\*

### III. Counterclaims

IN considering rules of procedure which require two or more actions where one ought to suffice, perhaps no greater weakness exists in West Virginia procedure than in the law concerning counterclaims. In this state the use of counterclaims is governed by the common law on recoupment, with a statutory modification, and by the statute permitting set-offs. The application of these rules has caused much confusion. The great number of cases in the appellate court involving counterclaims has not only shown the confusion but also has shown that counsel desire to avoid a multiplicity of actions and settle more claims in one action than now permitted. The writer suggests herein that existing rules unduly restrict the use of counterclaims but does not recommend at this time the adoption of rules requiring the use of counterclaims in any case.

Some of the confusion which has resulted in applying these rules on counterclaims may have been due to the fact that the terms "set-off" and "recoupment" have often been used interchangeably.<sup>1</sup> However, the decisions indicate certain definite rules applicable to what may be done under each remedy.<sup>2</sup>

#### *A. Limitations on Permissive Counterclaims in West Virginia*

In common law recoupment the defendant cannot recover

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\* This is the third of a series of articles by the same writer on this subject. The first concerned the joinder of parties and causes of action [52 W. VA. L. REV. 137 (1950)] and the second discussed amendments [53 W. VA. L. REV. 27 (1950)].

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<sup>1</sup> See, for example, the confusion caused where counsel for the defendant, at one time in the course of the trial, improperly designated a claim as "recoupment" rather than "set-off". *Warren v. Thompson*, 111 W. Va. 48, 51, 160 S.E. 297, 299 (1931). Also, in point 1 of the syllabus to *Fairbanks, Morse & Co. v. Breckinridge*, 84 W. Va. 233, 99 S.E. 398 (1919), the court used the term "set-off" when "recoupment" was involved and in the opinion it appears that counsel filed a "notice of recoupment in damages and set-off." In *Charleston Milling & Produce Co. v. Craighead*, 116 W. Va. 194, 179 S.E. 69 (1935), counsel avoided the problem by filing a "counterclaim", and the court considered the defendant's rights under both the recoupment and set-off statutes. For a general discussion of interchangeability of the terms, see Ritz, *The Law of Set-Off and Recoupment in West Virginia*, 36 W. VA. L.Q. 263 (1930).

<sup>2</sup> "The character of the claim is not changed by a name inadvertently given it." *Warren v. Thompson*, 111 W. Va. 48, 51, 160 S.E. 297, 299 (1931).

against the plaintiff for any excess in his damages,<sup>3</sup> but his damages need not be liquidated.<sup>4</sup> However, recoupment is not available against a plaintiff's demand based on a sealed instrument,<sup>5</sup> nor is it available unless the damages asserted are for a breach by the plaintiff of the contract sued on or a contract made at the same time and constituting "a part and parcel of the same transaction".<sup>6</sup>

The limitations on the common law remedy have been alleviated in two ways in West Virginia. One statute provides that in a suit for *any debt* the defendant *may* have allowed against such debt any payment or *set-off* which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature.<sup>7</sup> An accompanying statute provides that on the trial of the issue in such case the jury shall ascertain the amount to which the defendant is entitled and apply it as a set-off against the plaintiff's demand, and if such amount be more than the plaintiff is entitled to, the judgment shall be for the defendant against the plaintiff for such excess.<sup>8</sup> The provisions of this latter statute also apply to the statutory extension of the defendant's right to *recoup*, giving the defendant the right to recover over against the plaintiff. The recoupment statute will be discussed later.

This statute concerning set-offs allows the defendant to counterclaim against the plaintiff even though the damages claimed by the defendant did not arise out of the same contract or transaction.<sup>9</sup> However, the use of the term "set-off" in the statute caused the court to revert to older statutes for its meaning, with the result that the statute has been confined to liquidated demands.<sup>10</sup> Both

<sup>3</sup> *Natural Gas Co. v. Healy*, 33 W. Va. 102, 10 S.E. 56 (1889); see *Baltimore & Ohio R.R. v. Bitner*, 15 W. Va. 455, 465 (1879).

<sup>4</sup> See *Baltimore & Ohio, R.R. v. Jameson*, 13 W. Va. 833, 838 (1878).

<sup>5</sup> BURKS, PLEADING & PRACTICE § 229 (3d ed., Williams and Burks, 1943).

<sup>6</sup> *Fairbanks, Morse & Co. v. Breckinridge*, 84 W. Va. 233, 99 S.E. 398 (1919); *Clark's Cove Guano Co. v. Appling*, 33 W. Va. 470, 10 S.E. 809 (1890); *Logie v. Black*, 24 W. Va. 1 (1884). For a criticism of the way in which the rule became restricted to contractual claims against the plaintiff, see text at pages 154-156 *infra*.

<sup>7</sup> W. VA. CODE c. 56, art. 5, § 4 (Michie, 1949).

<sup>8</sup> *Id.* at c. 56, art. 5, § 9.

<sup>9</sup> *West Virginia Pulp & Paper Co. v. Whitmore*, 89 W. Va. 622, 109 S.E. 722 (1921). The statute may also be applied to a counterclaim arising out of the same contract. See *Monongahela Tie & Lumber Co. v. Flannigan*, 77 W. Va. 162, 166, 87 S.E. 161, 162 (1915).

<sup>10</sup> In reaching this conclusion in *Baltimore & Ohio R.R. v. Jameson*, 13 W. Va. 833 (1878), the court referred to both the English statute of 1729 and the first set-off statute, which was enacted in Virginia in 1645. A discussion of these early statutes is also contained in a note in 28 W. VA. L.Q. 139 (1922) and in 4 MINOR'S INSTITUTES 786 (3d ed. 1893).

the plaintiff's claim and the demand proposed to be set-off must be in the nature of a debt.<sup>11</sup>

The statute provides that a set-off may be used "in a suit for any debt".<sup>12</sup> The form of action need not be debt, but the plaintiff's claim must be substantially a debt.<sup>13</sup> No West Virginia case has been found in which a set-off was denied because the plaintiff's claim was not for a debt. However, it has been said that as a rule the action must be upon some demand which might itself be used as a set-off.<sup>14</sup> The question has often arisen whether the subject of set-off constituted a liquidated demand and thus was in the nature of a debt. Courts have not been able to agree on what constitutes liquidated damages, and the definitions thereof are confusing.<sup>15</sup> For the purposes of this paper the test applied by the West Virginia court may be used. The court held in one case that the items set up must be of that certain character which makes the amount easily ascertainable by simple calculation and that there was no uncertainty at all about the items claimed in that case as an offset because they were of that character which might be recovered in an action for goods sold and delivered.<sup>16</sup> Unliquidated damages for breach of a contract cannot be set-off.<sup>17</sup> In such cases neither debt

<sup>11</sup> The statute limits the use of set-offs to suits for debts, and by construction only claims which are in the nature of debts may be set-off. "It must be a debt against a debt." BURKS, PLEADING & PRACTICE § 223.

<sup>12</sup> W. VA. CODE c. 56, art. 5, § 4 (Michie, 1949).

<sup>13</sup> Charleston Milling & Produce Co. v. Craighead, 116 W. Va. 194, 179 S.E. 69 (1935) (notice of motion for judgment); Beuke v. Boggs Run Mining & Mfg. Co., 100 W. Va. 141, 130 S.E. 132 (1925) (action of trespass on the case); West Virginia Pulp & Paper Co. v. Whitmore, 89 W. Va. 622, 109 S.E. 722 (1921) (action of assumpsit); Baltimore & Ohio R.R. v. Jameson, 13 W. Va. 833 (1878) (action of debt for the recovery of the penalty named in a bond). In the last case the court said that set-off should be allowed regardless of the form of the suit or proceeding if it is in substance for the recovery of a debt. *Id.* at 842.

<sup>14</sup> BURKS, PLEADING & PRACTICE § 223. Judge Clark expresses the same idea in these words: "Set-off was available to the defendant only in actions founded upon such demands as might have been available as the subject of set-off by the plaintiff, had the action been brought by the defendant." CLARK, CODE PLEADING 636 (2d ed. 1947). This type of reasoning was used by the court in Warren v. Thompson, 111 W. Va. 48, 51, 160 S.E. 297, 298 (1931).

<sup>15</sup> BURKS, PLEADING & PRACTICE § 224. Stated in reverse, it is often difficult to determine when damages are unliquidated. See Ritz, *supra* note 1, at 274.

<sup>16</sup> West Virginia Pulp & Paper Co. v. Whitmore, 89 W. Va. 622, 109 S.E. 722 (1921). The rule is expressed more generally in Van Raalte Co. v. Solof Bros. Co., 89 W. Va. 66, 68, 108 S.E. 488, 489 (1921), where the court stated that the question is whether the claim amounts to a liquidated demand upon which an action of *indebitatus assumpsit* will lie. Another general statement of the rule is that the demand must be certain or capable of being reduced to certainty by calculation or computation. Baltimore & Ohio R.R. v. Jameson, 13 W. Va. 833, 841 (1878). See also notes 19 and 20 *infra*.

<sup>17</sup> Hooper-Mankin Fuel Co. v. Shrewsbury Coal Co., 94 W. Va. 442, 119 S.E. 176 (1923); American Sugar Refining Co. v. Martin-Nelly Grocery Co., 90 W. Va.

nor general assumpsit would lie, for there is no promise, express or implied, to pay "a sum certain".<sup>18</sup> The Virginia court has gone further in applying an identical statute, the one from which the West Virginia statute was adopted, and has allowed claims to be set-off whenever they may be definitely calculated or computed *from the evidence*.<sup>19</sup> However, it seems that the West Virginia court will continue to require a promise on the plaintiff's part to pay a sum certain, though the promise may be express or implied. Where the promise is express, the terms of the contract rather than the evidence must furnish the basis for computation of damages.<sup>20</sup> However, if the plaintiff raises no objection, unliquidated damages may be set-off.<sup>21</sup> In addition, the defendant may waive the damages for breach

730, 111 S.E. 759 (1922); *Cook Pottery Co. v. Parker*, 86 W. Va. 580, 104 S.E. 51 (1920); *Monongahela Tie & Lumber Co. v. Flannigan*, 77 W. Va. 162, 87 S.E. 161 (1915); *Ashland Coal & Coke Co. v. Hull Coal & Coke Corp.*, 67 W. Va. 503, 68 S.E. 124 (1910); *Case Mfg. Co. v. Sweeny*, 47 W. Va. 638, 35 S.E. 853 (1900); *Clark's Cove Guano Co. v. Appling*, 33 W. Va. 470, 10 S.E. 809 (1890).

<sup>18</sup> *BURKS, PLEADING & PRACTICE* § 224 n. 13. See also the general statements of the rule by the West Virginia court set forth in note 16 *supra*, the specific application of the rule in *Baltimore & Ohio R.R. v. Jameson*, 13 W. Va. 833, 843 (1878), being that the claim was one "for which the defendant could have sued the plaintiff in an action of *indebitatus assumpsit*, or debt."

<sup>19</sup> In *New Idea Spreader Co. v. R. M. Rogers & Sons*, 122 Va. 54, 94 S.E. 351 (1917), the court held that the defendants could set-off a claim for loss of profits resulting from the plaintiff's failure to supply items for sale by the defendants in accordance with the contract between them. The set-off was permitted since the damages could be computed or calculated "from definite data supplied by the evidence". *Id.* at 65, 94 S.E. at 354. The same liberality was shown in *Richardson Construction Co. v. Whiting Lumber Co.*, 116 Va. 490, 82 S.E. 87 (1914), where the court permitted the defendant to set-off the difference between the contract price and the higher price paid in the market for goods which the plaintiff failed to deliver. The court reached this conclusion on the erroneous reasoning that *indebitatus assumpsit* would lie for this claim. See *BURKS, PLEADING & PRACTICE* § 224 n. 13. The West Virginia court refused to allow a set-off based on similar facts and criticized the conclusion reached by the Virginia court. *Van Raalte Co. v. Solof Bros. Co.*, 89 W. Va. 66, 108 S.E. 488 (1921); see *Cook Pottery Co. v. Parker*, 86 W. Va. 580, 585, 104 S.E. 51, 53 (1920).

<sup>20</sup> *Hooper-Mankin Fuel Co. v. Shrewsbury Coal Co.*, 94 W. Va. 442, 119 S.E. 176 (1923); *American Sugar Refining Co. v. Martin-Nelly Grocery Co.*, 90 W. Va. 730, 111 S.E. 759 (1922); *Cook Pottery Co. v. Parker*, 86 W. Va. 580, 104 S.E. 51 (1920). Where the promise is implied, the amount due may be made sufficiently certain from the evidence to be allowed as a set-off. *Harman v. Harman*, 120 W. Va. 199, 196 S.E. 361 (1938) (accrued alimony assigned to the defendant); *Charleston Milling & Produce Co. v. Craighead*, 116 W. Va. 194, 179 S.E. 69 (1935) (value of goods converted by the plaintiff to his use); *Warren v. Thompson*, 111 W. Va. 48, 160 S.E. 297 (1931) (reasonable sum for use of a garage); *Beuke v. Boggs Run Mining & Mfg. Co.*, 100 W. Va. 141, 130 S.E. 132 (1925) (statutory penalty); *West Virginia Pulp & Paper Co. v. Whitmore*, 89 W. Va. 622, 109 S.E. 722 (1921) (value of material delivered). Compare the certainty of the amount due needed in the actions of debt and *indebitatus assumpsit*. *SHIPMAN, COMMON LAW PLEADING* §§ 54, 59-61 (3d ed., Ballantine, 1923).

<sup>21</sup> *Levine Bros. v. Mantell*, 90 W. Va. 166, 111 S.E. 501 (1922). Note that the court views the plaintiff's right to object to set-off of unliquidated damages

of a contract and assert as a set-off the value of material furnished under the contract.<sup>22</sup>

To assert an unliquidated claim as a counterclaim the defendant should resort to common law recoupment or the statutory extension of that right. The limitations on the common law remedy have been noted.<sup>23</sup> The present statute, extending the right, reads as follows:

"In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title to real property or of the title or the soundness of personal property, for the price or value whereof he entered into the contract, *or any other matter*, as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter existing before its execution, or any such mistake therein, or in the execution thereof, *or any such other matter*, as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit."<sup>24</sup>

The only changes made in the 1931 revision of this section of the Code were the insertion of the words "or any other matter" after the word "contract" near the beginning of the section, and the addition of the words "or any such other matter" near the end of the section.<sup>25</sup> Except for these changes the first part of the section gave the defendant no right of recoupment on unsealed contracts which he did not have at common law,<sup>26</sup> but it did permit him to recover any excess.<sup>27</sup> However, even before the addition of these

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as a "matter of form rather than substance". *Id.* at 172, 111 S.E. at 503. The court has also held that where a set-off is improperly allowed, even over the plaintiff's objection, the judgment is merely erroneous and not void. *Cross v. Gall*, 65 W. Va. 276, 64 S.E. 533 (1909) (claim not due between the same parties).

<sup>22</sup> *West Virginia Pulp & Paper Co. v. Whitmore*, 89 W. Va. 622, 109 S.E. 722 (1921). See also note 20 *supra*.

<sup>23</sup> See text at pages 142-143 *supra*.

<sup>24</sup> W. VA. CODE c. 56, art. 5, § 5 (Michie, 1949). Italics supplied.

<sup>25</sup> See the Revisers' note to this section of the Code.

<sup>26</sup> BURKS, PLEADING & PRACTICE 407.

<sup>27</sup> By filing a plea under this statute the defendant becomes entitled to recover any excess under the provisions of W. VA. CODE c. 56, art. 5, § 9 (Michie, 1949). No judgment for any excess could be recovered at common law under a notice of recoupment filed with the general issues of *nil debet* or *non assumpt*. *Monongahela Tie & Lumber Co. v. Flannigan*, 77 W. Va. 162, 87 S.E. 161 (1915); see *J. C. Orrick & Son Co. v. Dawson*, 67 W. Va. 403, 405, 68 S.E. 39, 40 (1910); *Natural Gas Co. v. Healy*, 33 W. Va. 102, 106, 10 S.E. 56, 58 (1889). To

words the section did extend the right of recoupment to actions on sealed contracts,<sup>28</sup> which right did not exist at common law,<sup>29</sup> and here also permitted the defendant to recover any excess.<sup>30</sup> The added words now permit the defendant to use in "recoupment" *any* matter which would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or which would entitle him to relief in equity, in whole or in part, against the obligation of the contract whether sealed or unsealed.<sup>31</sup> Nevertheless, the basic nature of the statute remains as recoupment, even though the defendant may recover any excess,<sup>32</sup> since the defendant's plea under the statute is limited to matters growing out of the contract on which he is being sued.<sup>33</sup> The statute enables the parties to settle in one action all matters between them growing out of the same transaction surrounding the contract on which the defendant is being sued, whether such matters are of tort or contract,<sup>34</sup> or liquidated or unliquidated,<sup>35</sup> but it goes no further.

Thus, the area within which the defendant may counterclaim and avoid a second action is very restricted in West Virginia. It is clear that there can be no set-off in a tort action<sup>36</sup> and that a tort

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recover an excess the defendant must file a plea under the statute; notice of recoupment filed with the general issue will not suffice. See *Monongahela Tie & Lumber Co. v. Flannigan*, *supra* at 168, 87 S.E. at 162. For criticism of a recent case indicating that matters of recoupment must be alleged by special plea, see Carlin, *Recent Developments in Local Procedure*, 47 W. VA. L.Q. 165, 166 (1941).

<sup>28</sup> *Fisher v. Burdett*, 21 W. Va. 626 (1883).

<sup>29</sup> BURKS, PLEADING & PRACTICE § 229. For any matter of recoupment against a sealed instrument, the defendant was required at common law to institute a separate suit against the plaintiff.

<sup>30</sup> By filing a plea under this statute the defendant becomes entitled to recover any excess under the provisions of W. VA. CODE c. 56, art. 5, § 9 (Michie, 1949).

<sup>31</sup> ". . . the revised section as a whole contemplates the settlement of all differences that are connected with the subject matter of the plaintiff's claim." Revisers' note to W. VA. CODE c. 56, art. 5, § 5 (Michie, 1949).

<sup>32</sup> See note 30 *supra*.

<sup>33</sup> See text at pages 157-160 *infra*.

<sup>34</sup> BURKS, PLEADING & PRACTICE 406. See also text at pages 157-160 *infra*.

<sup>35</sup> *Cook Pottery Co. v. Parker*, 86 W. Va. 580, 104 S.E. 51 (1920). See also text at pages 157-160 *infra*.

<sup>36</sup> *Watring v. Gibson*, 84 W. Va. 204, 100 S.E. 68 (1919); see *Hargreaves v. Kimberly*, 26 W. Va. 787, 800 (1885). In *Beuke v. Boggs Run Mining & Mfg. Co.*, 100 W. Va. 141, 130 S.E. 132 (1925), in an action of trespass on the case to recover a statutory penalty, the court permitted the defendant to set-off his claim for a penalty against the plaintiff under the same statute for mining coal within five feet of a contiguous boundary. However, in this case the court did not abandon the rule that there can be no set-off in a tort action. This was the basis of the decision: ". . . This is in fact . . . an action for a debt, whatever the form of action adopted, and though the form may be debt, assumpsit or case. . . ." *Id.* at 148, 130 S.E. at 135.

claim cannot be set-off.<sup>37</sup> In addition, because of the court's view of liquidated damages as an essential element of a set-off, not even all contract claims may be set-off;<sup>38</sup> and even if the claim proposed to be set-off is liquidated, it may not be used unless the claim asserted by the plaintiff is also liquidated.<sup>39</sup> Where unliquidated claims would be the basis of counterclaims, whether tort or contract claims, the defendant may counterclaim as to them only if they arose out of the same transaction which is the basis of the plaintiff's action and then only if it is an action on a contract.<sup>40</sup>

The injustice to the defendant in refusing him permission to counterclaim in other cases is illustrated by a West Virginia case<sup>41</sup> in which a nonresident plaintiff sued for the value of goods sold, and the defendants sought to offset two claims for damages for alleged breaches of the plaintiff's contracts to sell and deliver to the defendants certain other goods at prices stipulated in the contracts. Because of such breaches the defendants had been obliged to purchase in the market those goods at higher prices, whereby they were damaged to an amount largely in excess of the plaintiff's demand against them. There was no allegation that these claims arose out of the same transaction on which the plaintiff sued. The counterclaims were disallowed since they were unliquidated and arose out of a different transaction. The defendants were thus required to defend one action and then to proceed in a separate action, perhaps outside the state,<sup>42</sup> to recover against the plaintiff when they allegedly owed him nothing, the reverse being true. What justification exists for this treatment when the parties were

<sup>37</sup> *Fink v. United States Coal & Coke Co.*, 72 W. Va. 507, 78 S.E. 702 (1913); *Knight v. Brown*, 25 W. Va. 808 (1885); see *Hargreaves v. Kimberly*, 26 W. Va. 787, 800 (1885). In *Beuke v. Boggs Run Mining & Mfg. Co.*, 100 W. Va. 141, 130 S.E. 132 (1925), the court permitted a claim for the penalty under the statute for mining coal within five feet of a contiguous boundary to be set-off, but this was treated as an exception to the rule that tort claims may not be set-off or as not being a tort claim. The court stressed the point that the defendant's claim was "a demand for a fixed sum—a demand on which, when the facts on which it rests are ascertained, the law itself defines the measure of recovery." *Id.* at 149, 130 S.E. at 135.

<sup>38</sup> See text at pages 143-146 *supra*.

<sup>39</sup> See text at page 144 *supra*.

<sup>40</sup> See text at pages 146-147 *supra*. As to whether such counterclaims are permitted only where the action is one on a contract, see also text at pages 154-156 *infra*.

<sup>41</sup> *Van Raalte Co. v. Solof Bros. Co.*, 89 W. Va. 66, 108 S.E. 488 (1921). The result in this case has been previously criticized. *Ritz*, *supra* note 1, at 272; *Note*, 28 W. Va. L.Q. 139, 143 (1922).

<sup>42</sup> In the plea filed in the case it was alleged that the plaintiff was a non-resident corporation and that service of process could not be executed upon it in this state.



identical and all were before the court in the first instance? The claims would have been allowed as set-offs if they had not been unliquidated. They would remain unliquidated even if there was no dispute as to the market value of the goods purchased by the defendants.<sup>43</sup> Concededly the claims would have been allowed if they had grown out of the same transaction, and this would be true even though both the plaintiffs and the defendants' claims were unliquidated.

Thus, the refusal to permit many counterclaims may have no justification based on trial convenience, although the principles applied by the court may have that general purpose. Rules of pleading designed to prevent issues from becoming complex for the jury may work in this way an injustice where no confusion is likely to result. Even if on the facts of the particular case confusion is likely to result, the trial danger can be eliminated without restricting the pleadings. The device of segregating the issues for trial has been discussed earlier in this paper.<sup>44</sup>

Another case which illustrates the hardship which may be imposed on the defendant by these restrictive rules as to counterclaims is *J. C. Orrick & Son Co. v. Dawson*.<sup>45</sup> Although commentators have not criticized this case, as they have the last one,<sup>46</sup> it ought not to escape attention for it shows a refusal to permit a counterclaim not because it was not liquidated, although that was also true, but because the damages arose from a contract different from the one on which the plaintiff's action was brought. A nonresident plaintiff sued to recover a balance on an account for cans and solder sold to a resident defendant. The defendant attempted to recoup damages for the alleged failure of the plaintiff to accept canned goods in payment for the cans and solder as had been agreed. The defendant's testimony was excluded because such an agreement for payment varied from the written contract for the sale of the canned goods for cash payment, and apparently the cans and solder had been purchased at the time of, or prior to, the sale of the canned goods. Since the parole evidence rule prevented the two agreements from being "related parts of one contract", the defendant was not permitted to recoup damages incurred in selling the canned goods to another at a price lower than agreed. The court conceded that

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<sup>43</sup> See text at page 145 *supra*.

<sup>44</sup> Lugar, *Common Law Pleading Modified Versus the Federal Rules*, 52 W. VA. L. REV. 137, 190, 200, 204 (1950).

<sup>45</sup> 67 W. Va. 403, 68 S.E. 39 (1910).

<sup>46</sup> See note 41 *supra*.

if the cans and solder had been purchased later, the parole evidence rule would not prevent the admission of the defendant's evidence and the two agreements might be regarded as one for the purpose of recoupment. In either case the issues for the jury would have been the same, and again it becomes apparent that technicalities, rather than trial convenience, determine when counterclaims may be asserted in West Virginia.

*B. No Compulsory Counterclaims in West Virginia*

Having examined the cases in which counterclaims may be asserted, it remains to be determined whether the defendant is ever required to assert his counterclaim. At common law the remedy of recoupment is not compulsory. The defendant is entitled to elect whether to set up his damages by way of recoupment or to bring an independent action.<sup>47</sup> He is likely to bring an independent action if his damages exceeded the plaintiff's demand, because he can not recover an excess against the plaintiff;<sup>48</sup> and if he asserts his claim, he is precluded from bringing a subsequent action for the residue of the claim.<sup>49</sup> The West Virginia statute which expands the remedy of recoupment and allows recovery of any excess does not purport to be compulsory, merely providing that the defendant "may file a plea".<sup>50</sup> Likewise, the statute allowing set-offs does not purport to be compulsory, providing that the defendant "may have allowed" a set-off.<sup>51</sup> There is nothing to indicate that the defendant has been deprived of his privilege to use an independent action to assert any matter which he might use as a counterclaim.<sup>52</sup>

A recent West Virginia case indicates that the statutory expansion of the right to recoup may have deprived the defendant of his common law right to recoup his damages under the general issue. *In Attorneys' National Clearing House v. Greever*,<sup>53</sup> the lower court permitted the defendant to testify, over the plaintiff's objection,

<sup>47</sup> See *Logie v. Black*, 24 W. Va. 1, 19 (1884); *Baltimore & Ohio R.R. v. Bitner*, 15 W. Va. 455, 465 (1879); *Carlin*, *supra* note 27, at 170; *Ritz*, *supra* note 1, at 266.

<sup>48</sup> *Monongahela Tie & Lumber Co. v. Flannigan*, 77 W. Va. 162, 87 S.E. 161 (1915); *Natural Gas Co. v. Healy*, 33 W. Va. 102, 10 S.E. 56 (1889); see *Baltimore & Ohio R.R. v. Bitner*, 15 W. Va. 455, 465, (1879); also articles cited in note 47 *supra*.

<sup>49</sup> See *Baltimore & Ohio R.R. v. Bitner*, 15 W. Va. 455, 465 (1879); *BURKS, PLEADING & PRACTICE* 408; also articles cited in note 47 *supra*.

<sup>50</sup> The statute is quoted in the text at page 146 *supra*.

<sup>51</sup> The statute is paraphrased in the text at page 143 *supra*.

<sup>52</sup> Contrast the compulsory nature of the counterclaim procedure before justices of the peace. W. VA. CODE c. 50, art. 5, §§ 1-3 (Michie, 1949).

<sup>53</sup> 121 W. Va. 601, 5 S.E.2d 621 (1939).

that he was entitled to credits for fees or commissions for services in respect to collections which had not been allowed in computing the amount for which a note was given and on which he was being sued. The Supreme Court of Appeals held that the evidence had been erroneously admitted, stating that there "must be a special plea" alleging partial failure of consideration before this defense can be made. The court cited only the statute to support this conclusion. Professor Carlin has demonstrated that at common law partial failure of consideration in a contract not under seal may be proved under the general issue accompanied by a notice of recoupment and that there is nothing in the statute which has the effect of requiring the matter to be asserted by the special plea under oath therein provided.<sup>54</sup> Because of the extensive coverage of the present statute, this case may mean that no matter proper for recoupment in an action on a contract can be asserted except by the special plea.<sup>55</sup> However, the case could be distinguished if the court were confronted by a case in which a notice of recoupment accompanies the general issue, for, not only was there no special plea relating to this matter in the case, there seems to have been no notice of any kind to the plaintiff of the counterclaim. In any event, the case does not purport to deprive the defendant of his option either to set up his claim by a special plea under the statute or to maintain an independent action thereon against the plaintiff.

Although the recoupment statute permits the defendant to set up matters in an action at law on a contract which would entitle him to relief in equity against obligations thereunder,<sup>56</sup> another section of the Code expressly preserves the defendant's right to assert such matters in equity rather than in the law action.<sup>57</sup> Only where the defendant tenders such matter in his plea and the rights

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<sup>54</sup> Carlin, *supra* note 27, at 167.

<sup>55</sup> Filing of the statutory plea would be necessary to entitle the defendant to recover an excess against the plaintiff [W. VA. CODE c. 56, art. 5, §9 (Michie, 1949)]; but commentators have expressed doubt that the statute was intended to supersede common law recoupment, where it was available by notice under the general issue to defeat the action or to reduce the damages. BURKS, PLEADING & PRACTICE 408; Carlin, *supra* note 27, at 170. However, Professor Carlin states that the *Greever* case seems to indicate that matters formerly proper for recoupment by notice under the general issue must now be asserted by a special plea under oath. *Id.* at 176.

<sup>56</sup> W. VA. CODE c. 56, art. 5, § 5 (Michie, 1949).

<sup>57</sup> *Id.* at c. 56, art. 5, § 6. As to other equitable defenses which are permitted at law, the defendant is there also given the option of asserting them in the law action or resorting to equity for the relief to which he may be entitled. *Id.* at c. 55, art. 4, § 13.

asserted are litigated is he barred by the statute from relief in equity on the matter alleged in the plea.<sup>58</sup>

There is nothing in these statutes which requires even counterclaims growing out of the same transaction to be determined in one action, regardless of the simplicity of the issues which would be involved and even though the claims would involve common questions of law and fact.

### *C. Criticism of the West Virginia Rules*

In reading the West Virginia decisions on counterclaims, one is impressed by the antiquity of the authorities cited by the court and the dry logic which is applied to these precedents in deciding whether a multiplicity of actions may be avoided. No consideration is given to trial convenience, except as application of the rules may occasionally prevent a complexity of issues being submitted to a jury.

In many cases the rules permit counterclaims to be asserted irrespective of the confusion which may result. In an action on a contract the defendant is permitted under the statute to set up any matters growing out of the same transaction even though the plaintiff has brought an action for unliquidated damages,<sup>59</sup> and theoretically the jury is required to keep the issues sufficiently clear to determine which party is entitled to recover and the amount of the recovery. On the other hand, if it happens that the matter set up by the defendant is determined not to have arisen from the same transaction, the defendant is privileged to assert his claim only if both the plaintiff's claim and his claim are liquidated.<sup>60</sup> But here the defendant is not limited in the number of claims which he may assert if they are liquidated, and he may also assert in the same action any unliquidated demands arising from the contract sued on. Remember also that the plaintiff may have sued on any number of contracts in the same action.<sup>61</sup> In addition, under the tests used to determine whether the claims are liquidated, there is no

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<sup>58</sup> One point of ambiguity exists in the West Virginia statute. The statute provides that the defendant's right to assert in equity matters alleged in his plea is saved if his plea is rejected "for not being offered in due time". Is the defendant's right saved if the plea is rejected for some other reason? BURKS, PLEADING & PRACTICE 411.

<sup>59</sup> This statute is discussed in the text at page 146 *supra*.

<sup>60</sup> See text at pages 143-144 *supra*.

<sup>61</sup> See Lugar, *supra* note 44, at 174.

assurance that much confusion may not be involved even as to liquidated claims.<sup>62</sup>

Yet even with these possibilities, no counterclaim may be asserted in a tort action,<sup>63</sup> irrespective of the simplicity of the issues involved in the plaintiff's and defendant's claims or the common questions of law and fact that may be involved in the claims. On the other hand, many tort claims involving complex issues may be combined by the plaintiff when he sues.<sup>64</sup>

Despite this inconsistency in approach as to claims which may be decided in one action and the lack of any justification therefor based on rules of trial convenience, defendants may often be required to suffer hardships and the courts be burdened with additional unnecessary litigation as a result of the existing rules on counterclaims. When the court is called upon to decide whether compliance with existing rules has been obtained, the arguments which will be persuasive will have no relation to trial convenience. The decision will be based on rules perhaps designed generally to avoid undue complexity in the issues for trial, but whether their application in the particular case has that effect will not be controlling.

#### *D. Counterclaims in Other Jurisdictions*

How have other states dealt with the problem? Many code states have passed what may be called statutes of counterclaims. To find a satisfactory formula has not been free of difficulties, and various limitations on the assertion of claims by defendants have been tried. The aim of these statutes has been to enable litigants to settle in one action as many controversies as possible if inconvenience at the trial stage will not outweigh the advantages of settling the many claims in one action. These statutes have attempted to solve the problem in the same way generally as the West Virginia statutes do, but with greater liberality in permitting counterclaims to be asserted. The limitations on allowing the claims have been couched in terms which permit the court some discretion in application of the rules, but they too are designed to prevent inconvenience at the trial stage by imposing rules expected to accomplish this purpose generally without consideration of the facts or issues involved in the particular case before the court.

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<sup>62</sup> The nature of liquidated demands is discussed in the text at pages 144-145 *supra*. See especially notes 16 and 19 *supra*.

<sup>63</sup> See text at pages 147-148 *supra*.

<sup>64</sup> See Lugar, *supra* note 44, at 173.

Most of these statutes provide that the counterclaim "must be one existing in favor of a defendant against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"1. Cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." <sup>65</sup>

And many of the statutes add:

"2. In an action arising upon contract, any other cause of action arising also upon contract and existing at the commencement of the action." <sup>66</sup>

Judge Clark refers to the first provision as the "transaction" clause and to the second provision as the "contract" clause,<sup>67</sup> and for convenience the same terminology will be used herein.

### E. "Transaction" Clause Comparison

Since counterclaim statutes permit the defendant to recover an affirmative judgment against the plaintiff if his claim established at the trial exceeds that of the plaintiff,<sup>68</sup> the transaction clause corresponds generally with the West Virginia statute allowing this extension in recoupment.<sup>69</sup> However, the class of claims which may be asserted by the defendant is much more limited in West Virginia. As to claims allowed in recoupment at common law, the West Virginia court originally indicated that the defendant might recoup whenever the demands of both parties sprang out of the same "contract or transaction".<sup>70</sup> By application of the rule these quoted words came to determine the scope of each other and not to mean,

<sup>65</sup> CLARK, CODE PLEADING 642.

<sup>66</sup> *Ibid.* In a footnote on the cited page Judge Clark lists the states which have both provisions in their codes and those which have only the first provision, and citations to each code are included. Judge Clark also points out that those states which do not have the second provision in their codes have set-off provisions and that the decisions thereunder appear to be substantially the same as those under the second provision.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Id.* at 651.

<sup>69</sup> W. VA. CODE c. 56, art. 5, § 9 (Michie, 1949).

<sup>70</sup> *Baltimore & Ohio R.R. v. Jameson*, 13 W. Va. 833, 838 (1878); *Sterling Organ Co. v. House*, 25 W. Va. 64, 83 (1884). In the last case the court said: "... Recently not only has the term *recoupment* been revived, but the doctrine has sprung into new life. . . . it is now held that the defendant may *recoup* generally, whenever the demands of both parties spring out of the same contract or transaction; and it opens in this country generally the entire contract or transaction, so far as is necessary to determine the plaintiff's right to damages and the amount of the defendant's cross-claims." *Ibid.* See also *Clark's Cove Guano Co. v. Appling*, 33 W. Va. 470, 472, 10 S.E. 809, 810 (1890).

as in other jurisdictions, claims arising from the same contract or arising from some other occurrence.<sup>71</sup> Judge Green, in *Logie v. Black*,<sup>72</sup> in applying the rule to an action on a contract, stated:

"... *When the basis of the plaintiff's action is a contract*, and his complaint is that there has been a breach of such contract by the defendant, then the defendant may if he chooses recoup any damages, which may have resulted to him by a breach of another portion of the same contract or of a contract made at the same time and constituting a part and parcel of the same transaction, whether contained all in one writing or in two separate writings, or one in a writing and the other parol, provided however they are all one transaction. . . ."<sup>73</sup>

Using this case and two other West Virginia cases as precedents, a well known writer on West Virginia practice stated the rule as follows:

"The right of the defendant to recoup must necessarily arise out of contract, and this defense is *only available when the basis of the plaintiff's action is a contract*, and his complaint is that there has been a breach thereof by the defendant; in which case the defendant may recoup any damages which may have resulted to him by a breach of another portion of the contract or of a contract made at the same time and constituting a part and parcel of the same transaction, whether contained in one writing or in two separate writings, or one in writing and the other in parol, provided, however, they are all one transaction."<sup>74</sup>

Thus, what was first stated by the court as a broadening of what might be considered part of the same contract was limited by this writer to mean that recoupment could only be used if the basis of the plaintiff's action was a contract. Neither the *Logie* case nor the other two cases<sup>75</sup> cited in support of this proposition so held nor was there anything said by the court in those cases to imply that the rule was so limited. In fact the two additional cases are the ones in which the court had indicated that recoupment might be available if the claims arose from some other occurrence.<sup>76</sup> The only basis for the conclusion reached by this writer was a statement

<sup>71</sup> ". . . Any kind of claim at law could be used as recoupment against any kind of claim so long as the scope-limiting requirement that they arise out of the same transaction was observed." Blume, *The Scope of a Civil Action*, 42 MICH. L. REV. 257, 267 (1943). See also CLARK, CODE PLEADING 635; 47 AM. JUR., Setoff and Counterclaim § 21.

<sup>72</sup> 24 W. Va. 1 (1884).

<sup>73</sup> *Id.* at 19. Italics supplied.

<sup>74</sup> HOGG, PLEADING & FORMS § 262 (1895). Italics supplied.

<sup>75</sup> *Clark's Cove Guano Co. v. Appling*, 33 W. Va. 470, 10 S.E. 809 (1890); *Sterling Organ Co. v. House*, 25 W. Va. 64 (1884).

<sup>76</sup> See note 70 *supra*.

by the court in the *Logie* case,<sup>77</sup> which however was only intended by the court to apply to the facts of that case which did involve an action on a contract.<sup>78</sup>

Nevertheless, in *Bowling v. Walls*,<sup>79</sup> the court quoted the commentator as set forth above with approval, although in that case the principles enunciated therein were used for the purpose of supporting the court's holding that the defendant might recoup damages arising from breach of an agreement by the plaintiff even though the agreement was contained in a separate writing executed on the same date that the contract sued on was executed and grew out of the same transaction. No other authority was cited for this holding. Whether because of this approval or for some other reason, only one West Virginia case has been found in which the defendant sought to recoup damages when the plaintiff was not suing on a contract, and in that case recoupment was not allowed.<sup>80</sup> Irrespective of the possibility at common law of recouping damages when the plaintiff's claim does not arise from a contract,<sup>81</sup> the defendant can not recover by common law recoupment a judgment against the plaintiff for any excess.<sup>82</sup> For this reason the defendant will generally prefer to use the statutory plea of recoupment, set-off being inappropriate where damages are unliquidated, so that he may recover any excess established at the trial. The recoupment statute clearly applies only where the plaintiff sues on a contract.<sup>83</sup> No question can arise here concerning the possibility of the defendant's using the matters available under the statute in an action based on any other type of transaction.

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<sup>77</sup> "The defendant cannot *recoup*, unless his damages to be *recouped* arise from some breach of contract by the plaintiff, which is in some way . . . directly connected with the contract on which the action is based, and a part of the same transaction out of which the contract sued on arose. . . ." 24 W. Va. at 20.

<sup>78</sup> Note the italicized words in the quotation from the *Logie* case set forth in the text above. The sentence quoted in the text immediately precedes the statement quoted in note 77 *supra*.

<sup>79</sup> 72 W. Va. 638, 78 S.E. 791 (1913).

<sup>80</sup> *Fink v. United States Coal & Coke Co.*, 72 W. Va. 507, 78 S.E. 702 (1913). This case was decided approximately a month before the *Walls* case. It was an action for the value of animals taken and sold by the defendant as having been forfeited to the owner of lawfully enclosed premises by virtue of statutory proceedings. The defendant was denied the right to recoup the damages done to its property by the trespassing animals. Said the court: "Recoupment is peculiarly and only a contractual right and is limited to damages for breach of the identical contract on which the plaintiff sues." *Id.* at 511, 78 S.E. at 704.

<sup>81</sup> See note 71 *supra*.

<sup>82</sup> See cases cited in note 3 *supra*.

<sup>83</sup> "In any action *on a contract*, the defendant may file a plea. . . ." W. VA. CODE c. 56, art. 5, § 5 (Michie, 1949). Italics supplied.



The further question arises as to whether the defendant may under the statute "recoup" and recover any excess of damages arising from breach of a *separate* contract where it was a part of the transaction in which the contract sued on was executed. In the cases which arose prior to the revision of the statute in 1931 and which were decided on common law principles of recoupment, the court took the position that damages arising from such contracts might be shown in reduction of the plaintiff's claim as they might if they arose from breaches of other portions of the same contract.<sup>84</sup> The wording alone of the amended statute would indicate that no question should arise on this issue since it now provides that the defendant may set up *any* matter which would entitle him to recover damages at law from the plaintiff.<sup>85</sup> By using a plea under the statute the defendant should be able to avoid the question, which often arose on common law recoupment, as to whether the claim which he asserts arose from breach of a contract different from that on which the action was brought.<sup>86</sup>

<sup>84</sup> In *Bowling v. Walls*, 72 W. Va. 638, 78 S.E. 791 (1913), the plaintiff sold his store to the defendant and agreed to stay out of the mercantile business for a period of four months. Part of the consideration for the sale was represented by notes; the agreement not to compete was contained in a separate writing of the same date as the notes. In an action on one of the notes the defendant was permitted to recoup damages from breach of the agreement not to compete since they arose "out of the very transaction which affords a basis of plaintiff's action." *Id.* at 639, 78 S.E. at 791. See also the quotation from the *Logie* case in the text at page 155 *supra*.

<sup>85</sup> "... the defendant may file a plea alleging . . . any other matter, as would entitle him either to recover damages at law from the plaintiff . . . or to relief in equity . . . against the obligation of the contract. . . ." W. VA. CODE c. 56, art. 5, § 5 (Michie, 1949). The complete section is quoted in the text at page 146 *supra*.

<sup>86</sup> *Claims held not to arise from the same "contract":*

(1) where the contract sued on placed the plaintiff under no obligation to the defendant to procure claims for the defendant to prosecute, the plaintiff's procuring the revocation of the defendant's authority to prosecute claims after the defendant had spent labor and money in their prosecution, *Logie v. Black*, 24 W. Va. 1 (1884).

(2) where the defendant's demand for damages for the plaintiff's failure to perform a contract grew out of the contract of agency between the parties for one year and the plaintiff's demand rested on a note given under an agency between the same parties for the preceding year, *Clark's Cove Guano Co. v. Appling*, 33 W. Va. 470, 10 S.E. 809 (1890);

(3) where the defendant agreed by one contract to purchase cans and solder from the plaintiff who by an independent contract agreed to buy canned goods from the defendant, *J. C. Orrick & Son Co. v. Dawson*, 67 W. Va. 403, 68 S.E. 39 (1910);

(4) where the plaintiff sued on two notes given in settlement for a pumping outfit for defendant's house, the defendant's claim for damages for breach of an independent contract for new parts, *Fairbanks, Morse & Co. v. Breckinridge*, 84 W. Va. 233, 99 S.E. 398 (1919); *accord*, *American Sugar Refining Co. v. Martin-Nelly Grocery Co.*, 90 W. Va. 730, 111 S.E. 759 (1922);

However, the West Virginia court may reach the conclusion that the words "or any other matter", inserted by the revisers to make the statute read as did the Virginia statute,<sup>87</sup> apply only to "other matters" which grow out of the contract on which the defendant is sued. In construing this statute the Virginia court reached this conclusion,<sup>88</sup> and applied the rule to prevent the defendant from "recouping" damages arising from breach of the contract from which the transaction involved in the action had resulted.<sup>89</sup> One may only hope that the West Virginia court will be more influenced by the revisers' note than by the construction and application of the statute by the Virginia court. The revisers stated that the added words are intended to give the defendant a

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(5) where the damages claimed by the defendant resulted from the inferior quality of feed furnished to him by the plaintiff prior to the time the orders were given on which the action was based, *Allen v. Simmons*, 90 W. Va. 774, 111 S.E. 838 (1922).

*Claims held to arise from the same "contract":*

(1) where the plaintiff sued for the price of certain organs furnished the defendant under a contract which provided that the plaintiff would furnish organs as requested until reasonable notice to the contrary was given, claim for damages for failure of the plaintiff to furnish certain organs without having given the defendant reasonable notice, *Sterling Organ Co. v. House*, 25 W. Va. 64 (1884);

(2) where the plaintiff sued on one of the notes representing part of the consideration for the sale of a mercantile business, a claim for damages from breach of plaintiff's agreement to stay out of the mercantile business for a period of four months, even though the plaintiff's agreement was contained in a separate writing, *Bowling v. Walls*, 72 W. Va. 638, 78 S.E. 791 (1913);

(3) where the plaintiff sued on promissory notes of the defendants, a claim for damages arising from breach of plaintiff's agreement to continue a sales arrangement from which sums due the defendants would be applied in payment of the notes, *Cook Pottery Co. v. Parker*, 86 W. Va. 580, 104 S.E. 51 (1920); *accord*, *Hooper-Mankin Fuel Co. v. Shrewsbury Coal Co.*, 94 W. Va. 442, 119 S.E. 176 (1923);

(4) where the plaintiff sued on certain notes given for radio supplies sold to the defendant under a contract which provided that the plaintiff would appoint no other dealers for Atwater-Kent supplies in a certain area without talking it over with the defendant, a claim for damages resulting from the plaintiff's appointing another dealer without discussing the matter with the defendant, *Williams Hardware Co. v. Phillips*, 109 W. Va. 109, 153 S.E. 147 (1930).

<sup>87</sup> VA. CODE § 6145 (Michie, 1930). For the West Virginia statute, see note 85 *supra*.

<sup>88</sup> *American Manganese Co. v. Virginia Manganese Co.*, 91 Va. 272, 21 S.E. 466 (1895).

<sup>89</sup> In this case the plaintiff had sold certain personal property to the defendant after the expiration of a lease and in accordance with the terms of the lease between the parties. An action was brought to recover the agreed price, and the defendant sought to plead damages sustained by it as lessor through violation by the plaintiff of other provisions in the lease. See defendant's plea. *Id.* at 277, not reprinted in *Southeastern Reporter*. A demurrer to the plea was sustained since the court viewed the agreements in the declaration and plea as "separate and distinct". *Id.* at 280, 21 S.E. at 466.

right to recover an excess over, to which he is entitled, in any instance where he *recoups* damages under the provision of the article.<sup>90</sup> If the court should adopt the view of the Virginia court, the defendant will need to determine whether his damages arose from a "different contract" and the cases in which this question arose on common law recoupment should be persuasive.<sup>91</sup> In any event, since the revisers viewed the statute as an aid in recoupment, the court ought to permit the defendant to treat the contract sued on as including "another portion of the contract or of a contract made at the same time and constituting a part and parcel of the same transaction."<sup>92</sup> The West Virginia court has indicated that such counterclaims will be allowed.<sup>93</sup> The Virginia court has been influenced in its construction of the statute by the words "against the obligation of the contract."<sup>94</sup> These words could be held to apply only to equitable defenses permitted to defeat the plaintiff's recovery, and the words "any other matter which would entitle him to recover damages at law from the plaintiff" be held to permit the defendant to plead any cause of action, whether arising out of the contract sued on or not, which entitles him to recover damages from the plaintiff. However, in view of its historical background as a statute of recoupment and its having been patterned on the Virginia statute, this interpretation does not appear likely. This is especially true since such interpretation would render the set-off statute unnecessary if the word "contract" in the recoupment statute were held to include implied contracts.

In any event, the addition of these words to the statute should remove the inequities present in that series of cases which formerly held that an unliquidated claim, though arising out of the same transaction, could not be the subject of set-off with a right to re-

<sup>90</sup> Revisers' note to W. VA. CODE c. 56, art. 5, § 5 (Michie, 1949).

<sup>91</sup> These cases are collected in note 86 *supra*.

<sup>92</sup> Contrast the treatment accorded the defendant by the West Virginia court under the principles of common law recoupment with that accorded the defendant by the Virginia court under the statute. See notes 84 and 89 *supra*.

<sup>93</sup> In *Charleston Milling & Produce Co. v. Craighead*, 116 W. Va. 194, 179 S.E. 69 (1935), the plaintiff sued on a note signed by the defendants. At the time of signing the note, and to secure the payment thereof, the defendants conveyed certain property to a trustee. Before instituting this action the plaintiff purchased this property at a void sale under the trust deed. The defendant filed a "counterclaim" for the value of the goods thus converted by the plaintiff. Said the court: "... The trust deed and note being parts of the same transaction, the counterclaim is also authorized under the statute of recoupment, Code 1931, 56-5-5. . . ." *Id.* at 195, 179 S.E. at 69. The claim was held also proper under the set-off statute.

<sup>94</sup> See *Cox v. Hagan*, 125 Va. 656, 677, 100 S.E. 666, 673 (1919).

cover any excess.<sup>95</sup> In this situation the most that the defendant could do was to recoup his damages with no possibility of a recovery for any excess. An outstanding example of this treatment was involved in *Hooper-Mankin Fuel Co. v. Shrewsbury Coal Co.*<sup>96</sup> The plaintiff sued on a note which originated out of a contract under which the plaintiff advanced the defendant money and agreed to purchase coal from the defendant, the payments for the coal to be credited on the note. The defendant filed a plea of set-off for damages from the plaintiff's refusal to take the coal, and refused to allow the plea to be treated by the court as a notice of recoupment to the extent of the plaintiff's demands. The lower court struck out all of the defendant's evidence relating to the contract and directed a verdict for the plaintiff. The Supreme Court of Appeals affirmed the judgment even though it recognized that the defendant proposed to offset its unliquidated demand arising out of the same transaction.<sup>97</sup> A plea under the present statute involving such claims should permit the defendant to recover any excess.<sup>98</sup>

The transaction clause used in other states permits counterclaims where the cause of action asserted arose out of (1) the contract, or (2) the transaction set forth in the complaint as the foundation of the plaintiff's claim, or (3) those connected with the subject of the action.<sup>99</sup> The West Virginia court limits common law recoupment to the first of these classes, with an extension approaching the second class,<sup>100</sup> but refuses to allow counterclaims which might be permitted under groups two or three.<sup>101</sup> The West Virginia extension in class one was also recognized in these other states as possible under class one.<sup>102</sup> The more flexible limitations in classes

<sup>95</sup> The earlier cases are collected and cited in the *Shrewsbury Coal Co.* case, note 96 *infra*.

<sup>96</sup> 94 W. Va. 442, 119 S.E. 176 (1923).

<sup>97</sup> *Id.* at 445, 119 S.E. at 177.

<sup>98</sup> See note 93 *supra*. If the counterclaim is authorized under W. VA. CODE c. 56, art. 5, § 5 (Michie, 1949), then section nine of the same chapter and article authorizes recovery of any excess over the plaintiff's demand.

<sup>99</sup> CLARK, CODE PLEADING § 102. See also text at page 154 *supra*.

<sup>100</sup> See the West Virginia case discussed in note 84 *supra*.

<sup>101</sup> For scope of classes two and three, see text which follows.

<sup>102</sup> "Contract" is . . . used to refer to the course of negotiations culminating in the agreement sued upon." CLARK, CODE PLEADING 655. In a note to this statement Judge Clark collects cases to illustrate its meaning. One of these involved an action for rent in which the defendant was permitted to counterclaim for the conversion of his oats, grown by permission on other land of the plaintiff to feed teams for harvesting crops on the leased premises—a claim growing out of the negotiations leading up to the lease sued on. *Brunson v. Teague*, 123 Ark. 594, 186 S.W. 78 (1916). Compare the West Virginia case decided under the revised recoupment statute. See note 93 *supra*. Contrast the Virginia case discussed in note 89 *supra*.

two and three have never concerned the West Virginia court in deciding whether the defendant might recoup his claim, and as previously indicated, there seems to be little likelihood of any greater privilege being given to the defendant under the revised recoupment statute. In view of these facts and since the writer believes the approach used in these statutes is not advisable, as will appear more fully herein, little space will be given to a discussion of the possibilities under classes two and three. It will suffice to state generally what might be done under them to show how much further the defendant in these jurisdictions may be allowed to counterclaim.

Class two might include "all those facts which a layman would naturally associate with, or consider as being a part of, the affair, altercation, or course of dealings between the parties";<sup>103</sup> and class three might allow "any cause of action which, although not a part of the plaintiff's transaction, would, upon trial, raise issues which are so like those raised by the complaint that justice and expediency require that they should be tried together".<sup>104</sup> As might be expected the courts have not drawn clear lines of distinction between causes of action arising out of the "transaction" and those connected with the "subject of the action", but within those terms the defendant is permitted to use counterclaims of the following nature:<sup>105</sup> in an action on a promissory note for the purchase price of the plaintiff's business, a counterclaim for false representations and publications that the plaintiff had not sold his business but had merely arranged for the defendant to run it until he returned;<sup>106</sup> in an action for supplies furnished and labor performed at the request of the defendant, a counterclaim for breach of warranty in the sale of the automobile on which the repairs were made;<sup>107</sup> in an action for

<sup>103</sup> CLARK, CODE PLEADING 655.

<sup>104</sup> *Ibid.*

<sup>105</sup> Four examples only are set forth in the text which follows. They were selected in such way that the range of possibilities under the "transaction" clause might be noted and that the liberality permitted might be contrasted with the West Virginia rules previously discussed. The cases here used as well as many more which illustrate these points are set forth in the notes to CLARK, CODE PLEADING § 102, although not in as great detail as in the text which follows. See also examples of claims held to arise out of the transaction or occurrence that is the subject matter of the suit. 3 MOORE, FEDERAL PRACTICE 35 (2d ed. 1948). Contrast especially the court's statement in *Fairbanks, Morse & Co. v. Breckinridge*, 84 W. Va. 233, 235, 99 S.E. 398, 399 (1919), that it is "not sufficient the damage claimed may have some relation to the subject matter of the original contract."

<sup>106</sup> *Driver v. Gillette*, 43 S.D. 62, 177 N.W. 815 (1920).

<sup>107</sup> *Studebaker Corp. of America v. Hanson*, 24 Wyo. 222, 160 Pac. 336 (1916).

assault and battery, a counterclaim for damages resulting from an assault committed on the defendant by the plaintiff in the course of the encounter;<sup>108</sup> and in an action in replevin for the possession of certain personalty, a counterclaim for legal services rendered in connection with the manufacture of the chattels replevied.<sup>109</sup>

#### F. "Contract" Clause Comparison<sup>110</sup>

The contract clause corresponds generally with the West Virginia set-off statute, since the contract in the counterclaim need not arise out of the same transaction as the contract on which the action is based;<sup>111</sup> although here again greater liberality is permitted than in West Virginia. There is no requirement that either the plaintiff's or the defendant's claim be liquidated which is required of both under the West Virginia statute.<sup>112</sup> However, in the contract clause, as in the transaction clause, these statutes attempt to prevent great inconvenience from arising at the trial by limiting generally, but not on the facts of the particular case, what may be tried by a jury in one action. In the transaction clause greater liberality is permitted as to asserting unliquidated claims, for the added burden at trial is offset by the benefits of trying in one action the different claims arising from one set of facts. Under the contract clause the facts involved on each claim may have nothing in common since the demands may arise out of different transactions. Because of the possible trial burdens the courts therefore place rather restrictive interpretations on the contract clause with the result that the defendant can not assert many more counterclaims under it than he can under the West Virginia set-off statute.

This type of statute for West Virginia has been urged,<sup>113</sup> but it would meet the problem only in a limited fashion. The contract clause has not been applied as often as the transaction clause, and

<sup>108</sup> Gutzman v. Clancy, 114 Wis. 589, 90 N.W. 1081 (1902).

<sup>109</sup> Elevator Automatic Signal Co. v. Bok, 159 N.Y. Supp. 13 (1st Dep't 1916).

<sup>110</sup> The statutes here to be discussed have already been described and the source of the terminology being used has been noted. See notes 66 and 67 *supra* and the accompanying text.

<sup>111</sup> CLARK, CODE PLEADING 661. See also text at page 154 *supra*. As noted above in the text, the contract provision in the transaction clause limits counterclaims to those arising out of the contract or transaction set forth in the plaintiff's pleading. This distinction between recoupment and set-off in West Virginia has been developed earlier in the text.

<sup>112</sup> See note 11 *supra*. Compare Thayer-Moore Brokerage Co. v. Campbell, 164 Mo. App. 8, 147 S.W. 545 (1912), cited in CLARK, CODE PLEADING 661.

<sup>113</sup> Ritz, *supra* note 1, at 277. See also Note, 28 W. VA. L.Q. 139 (1922).

the decisions have usually involved the question of whether the counterclaim arose "upon contract" rather than whether the plaintiff's action arose "upon contract". Many of these cases support the conclusion that any cause of action which might afford a basis for a claim in express or implied contract may be offered as a counterclaim under the contract clause.<sup>114</sup> It would seem that a similar conclusion ought to be deducible concerning the plaintiff's cause of action in order that the counterclaim be permitted.<sup>115</sup> However, many cases do not support the conclusions stated, adopting more restrictive rules, and the scope of the contract clause is left doubtful.<sup>116</sup>

### G. The Federal Rule

This fear of trial burdens, illustrated in the restrictive interpretations placed on the contract clause, has caused courts and drafters of statutes to limit greatly the scope of permissive counterclaims. Some of the harsh results thereof have been noted herein and others will be discussed. The approach in the Federal Rules and statutes or rules based on those rules seems much more sensible. The matter of trial convenience is given due consideration as a problem at the trial stage, but not as a pleading matter. This permits treatment of each case on its facts and avoids the possibility of inconvenience at the trial under general pleading rules designed to prevent such burdens. It also permits the pleading rules to be designed to prevent harsh results and to settle expeditiously the cross-claims between the parties to the litigation.<sup>117</sup>

Federal Rule 42 (b) provides that the court in furtherance of convenience or to avoid prejudice may order a separate trial of any counterclaim or of any number of counterclaims.<sup>118</sup> With this discretion in the trial court to order separate trials to prevent undue delay or otherwise promote the interests of justice, Federal Rule 13 allows great liberality in asserting counterclaims.<sup>119</sup> It also provides for compulsory assertion of counterclaims which are closely related

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<sup>114</sup> CLARK, CODE PLEADING 663. Note that this would include contract actions for unliquidated damages.

<sup>115</sup> Note that the same approach is used in determining whether a claim may be used as a set-off under the West Virginia statute, namely, both the plaintiff's claim and the defendant's demand must be of the same nature. See text at page 144 *supra*.

<sup>116</sup> CLARK, CODE PLEADING § 103.

<sup>117</sup> Judge Clark has referred to the federal rules which authorize a wide scope in the counterclaim procedure as "among the more useful provisions of the new practice." CLARK, CODE PLEADING 645.

<sup>118</sup> Fed. Rules Civ. Proc., 28 U.S.C.A. (1950).

<sup>119</sup> *Ibid.*

to the claim that is the subject matter of the action. Any counterclaim which arises out of "the transaction or occurrence" that is the subject matter of the opposing party's claim, with certain limited exceptions, *must* be asserted. Any counterclaim *not* arising out of the transaction or occurrence that is the subject matter of the opposing party's claim *may* be asserted. This wording of the rule requires or permits the plaintiff to take the same action on counterclaims asserted by the defendant which involve independent demands.<sup>120</sup>

#### *H. Proposed Rule for West Virginia*

The writer is hesitant to advocate the adoption of compulsory counterclaims, even to the extent required by the federal rule,<sup>121</sup> in West Virginia procedure at this time. The federal rule is designed to obtain a complete settlement of all claims arising out of the same set of facts. The objective is desirable and has been supported in this paper in urging that goal for permissive joinder of causes of action.<sup>122</sup> It is recommended here as far as permissive assertion of counterclaims is concerned. However, it seems preferable that the bench and bar first have some experience with severance of issues for trial before requiring that there be asserted in the action all claims the defendant may have arising from the transaction or occurrence on which the plaintiff's claim is based.<sup>123</sup> This is especially true if legal and equitable claims must be asserted in the same

<sup>120</sup> Doubt arises as to whether the plaintiff should be permitted to assert in his reply a counterclaim not arising out of the transaction or occurrence which is the subject matter of the defendant's claim. CLARK, CODE PLEADING 649; 3 MOORE, FEDERAL PRACTICE 22. Both writers suggest that the proper procedure would be to require the plaintiff to amend his complaint to add the claim based on the independent transaction. The liberality of the federal rules on amendments and joinder of claims has been previously discussed in this paper. Similar problems can arise under the first sentence of W. VA. CODE c. 56, art. 5, § 9 (Michie, 1949).

<sup>121</sup> Some persons believe that all counterclaims of every nature should be compulsory, that is, every claim a party has against his opponent should be pleaded regardless of choice. For a criticism of this suggestion, see 3 MOORE, FEDERAL PRACTICE 27.

<sup>122</sup> Lugar, *supra* note 44, at 199, 204.

<sup>123</sup> Note that the federal rule would also require the plaintiff to assert any counterclaims which arose out of matters set forth by the defendant. Even the experience which may have been acquired by the West Virginia bar under the mandatory provisions of the counterclaim procedure before justices of the peace, applicable to both plaintiffs and defendants, would not seem to be very helpful. The claims there involved are small and the scope of required counterclaims is narrower than that under the federal rule. In addition, no procedure involving separation of issues for trial is involved. W. VA. CODE c. 50, art. 5 (Michie, 1949).



action.<sup>124</sup> In addition, the concept of "transaction or occurrence" being flexible,<sup>125</sup> the pleader would assert every possibly related claim to protect himself from being barred from the later assertion of any claim by the doctrine of *res adjudicata*.<sup>126</sup> It is feared therefore that too many complications would result if the compulsory counterclaim procedure were adopted initially. The writer concedes that under the permissive counterclaim procedure recommended herein counsel *may* produce the same complications; but where prejudice or delay in the trial of his claims is likely to result, they may be saved for independent litigation. If counsel seeks to cause complications, a free use of severance of issues for trial will protect the opposing party from prejudice or delay.

The proposal here made is that the pleader be *permitted* to assert as counterclaims *any* claims which he has against the opposing party with the right to recover a judgment against him for any excess established at the trial and to any other relief to which he would be entitled if the claims were asserted in independent actions.<sup>127</sup> This would include under a merger of procedure at law and in equity the assertion of a legal claim in an "equity" proceeding or an equitable claim in a proceeding "at law".<sup>128</sup> Statutes

<sup>124</sup> This subject is discussed in the next part of this paper.

<sup>125</sup> "... 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. . . ." *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926). See 3 MOORE, FEDERAL PRACTICE § 13.13, for a comprehensive discussion of the scope of the concept, recognizing that the scope has been broadened by use of "transaction or occurrence" in lieu of "transaction" as found in some rules. Note also the kind of counterclaims permitted under the transaction clause in other jurisdictions. See text at page 161 *supra*.

<sup>126</sup> That the principle of *res adjudicata* will apply under the federal rule to counterclaims which are omitted when they should have been pleaded, see CLARK, CODE PLEADING 648; 3 MOORE, FEDERAL PRACTICE 28.

<sup>127</sup> This would permit all claims between the parties to be pleaded as counterclaims. The distinction between set-off and recoupment would become immaterial. A tort claim might be asserted in a contract action, or vice versa. It would not be important whether the counterclaim arose from the subject matter involved in the opposing party's claim, independent claims being equally permissible. The counterclaim need not be one which would reduce or defeat the opposing party's recovery; the demand might exceed the amount sought by the other or might be for a different kind of relief, the latter possibility being especially important if legal and equitable procedure are merged. See 3 MOORE, FEDERAL PRACTICE § 13.02, on the scope of Federal Rule 13.

There may be some who would prefer to limit this broadened right to counterclaim to certain types of actions or proceedings. Some code states follow this procedure. CLARK, CODE PLEADING 649.

<sup>128</sup> This is permitted under Federal Rule 13. 3 MOORE, FEDERAL PRACTICE 10. The subject of combining legal and equitable procedure will be discussed in the next part of this paper. The manner of handling the right to jury trial is treated there.

similar to this had been passed prior to the adoption of the Federal Rules.<sup>129</sup> A rule of this nature would remove all restrictions on the right to plead counterclaims, but the purpose of the existing technical restrictive rules would be fulfilled by a discretion in the trial court to sever the claims for trial if the combination was *in fact* so complex that it would be difficult for the jury, if a jury were required, to "keep the accounts straight."<sup>130</sup> The court should have the power even during the original trial to sever claims and order separate trials of them if the complexity of the issues involved was not evident prior to the introduction of the evidence.

The suggestion here made would give the defendant the same freedom of asserting independent claims against the plaintiff as has been proposed herein for the plaintiff against the defendant by liberalizing the rules on permissive joinder of claims or causes of action.<sup>131</sup> In like manner, the defendant's omission to assert a counterclaim would not prevent his using the claim as the basis of an independent action,<sup>132</sup> unless he asserted part of the claim as a counterclaim and a later action thereon would involve a splitting of the cause of action.<sup>133</sup> On the other hand, the defendant would be limited in the assertion of two or more independent claims by the rules on joinder of claims, which have been discussed.<sup>134</sup>

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<sup>129</sup> CLARK, CODE PLEADING 643-644 and notes thereto. Compare the English practice which permits the defendant to set up any counterclaim whatsoever against the plaintiff and to bring into court additional parties necessary for its complete determination, the court having discretion however to exclude the counterclaim on application of any party to it. For example, it might be more conveniently tried in a separate action. 3 MOORE, FEDERAL PRACTICE 12 n. 4. Compare the text which follows.

<sup>130</sup> This power of severance exists under the Federal Rules. See note 118 *supra*.

<sup>131</sup> Lugar, *supra* note 44, at 204.

<sup>132</sup> 3 MOORE, FEDERAL PRACTICE 48 n. 2. This right the defendant now has in West Virginia with reference to recoupment and set-off. See text at page 150 *supra*. It need not be affected by a liberalization of the rules as to permissible counterclaims. Compare also the statute which expressly preserves the defendant's right to proceed in equity even where he has been authorized to use as legal defenses other matters formerly available only in equity for relief. W. VA. CODE c. 55, art. 4, § 13 (Michie, 1949).

<sup>133</sup> See authorities cited in note 49 *supra*.

<sup>134</sup> The limitations on the joinder of claims under the Federal Rules have been discussed in a preceding part of this paper. Lugar, *supra* note 44, at 199, 204. See 3 MOORE, FEDERAL PRACTICE 50-51. The example given by Professor Moore will serve to summarize the possibilities: "Suppose that *A*, *B*, and *C*, joint obligees under a contract, sue *X*, *Y*, and *Z*, joint obligors. Any . . . claims that they [*X*, *Y*, and *Z*] have jointly against *A*, *B*, and *C* may be counterclaimed. But could *Z* also plead a claim, say for libel, against only *C* that had no relation to the other claims? It would seem that he could not, for inasmuch as his libel claim presents no question of law or fact common to the other claims, its joinder would have been improper had *X*, *Y*, and *Z* proceeded as plaintiffs. That claim could, however, be severed and proceeded with separately." *Id.* at 51 n. 15.

The suggested change would permit the defendant to file a counterclaim in cases like *Fink v. United States Coal & Coke Co.*<sup>135</sup> and *Knight v. Brown*.<sup>136</sup> In the *Fink* case the plaintiff sued for the value of fifteen hogs taken by the defendant. The defendant claimed that a statute authorized the seizure in view of previous trespasses by the hogs. In this action the defendant also attempted to recoup or set-off a claim for damage done by the hogs. Neither remedy was broad enough to permit the defendant to obtain this relief in the action, even though the same facts, except for the amount of the damage done, were relevant to the defendant's defense. It is difficult to see how the additional issue of the amount of damage done could have introduced any great confusion into the trial. Clearly the confusion would not have been as great as it might be in those cases where the plaintiff is suing for unliquidated damages from the breach of a contract and the defendant sets up counterclaims for unliquidated damages from breaches of other provisions of that contract. The latter would be allowed in West Virginia.<sup>137</sup>

In the *Knight* case the plaintiff sued for damages resulting from the diversion of a stream of water by the defendant so that it flowed on the plaintiff's land. The defendant attempted to set up as a bar to the action a plea that the plaintiff had caused the stream to flow on the defendant's land by denuding the banks of the stream along that portion of it which passed through his land before it reached the land of the defendant. The court held that acts of wilful trespass could not be "set-off" against each other; but that so far as the act of the plaintiff may have aggravated his own injury, it might be shown in diminution of the damage claimed by him. Since the defendant would want to prove these facts in mitigation of damages from his act, it would require little other evidence to show the amount of damage which the act of the plaintiff had caused to his land. No confusion was likely to result if he had been permitted to establish his damages under a counterclaim.

Matters of this nature could be allowed without even the necessity of a separate trial. Our court has recognized that the prevailing rules prevent counterclaims being filed although no difficulty would be encountered at the trial stage. In *Levine Bros.*

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<sup>135</sup> 72 W. Va. 507, 78 S.E. 702 (1913).

<sup>136</sup> 25 W. Va. 808 (1885).

<sup>137</sup> See text at page 146 *supra*.

*v. Mantell*,<sup>138</sup> the plaintiff sued for recovery of the price of goods sold during an eight-month period, and the defendant asserted by way of set-off a claim of damages for nondelivery of a part of one order. Since the plaintiff made no objection to this set-off, which was improper being an unliquidated claim, the court held that the lower court had jurisdiction to try the "two cases" together and that the plaintiff was bound by the judgment. The court said:

"... The question relates to the rights of the parties. . . , and that right pertains to matters of form rather than substance. . . . If a separate action had been instituted by the defendant and both actions matured and made ready for hearing, we have no doubt that the trial court, in its discretion and with their consent, could have ordered them to be heard together and tried by one jury. . . ." <sup>139</sup>

Additional recognition that existing rules on counterclaims are unduly restrictive may be found in the procedural rule respecting cross-actions in tort, promulgated by the Supreme Court of Appeals in 1940.<sup>140</sup> This rule provides for compulsory consolidation where two actions based on the same occurrence are pending and the parties plaintiff and defendant therein have charged each other with liability for negligence. This rule was designed to lessen the likelihood that the doctrine of *res adjudicata* might be used unfairly, and it will continue to be necessary for that purpose.<sup>141</sup> However, the issues involved in one trial under this procedure may produce greater confusion than would be present in the assertion of many counterclaims not permitted in West Virginia. The trial confusion resulting under the suggested rule would be less than that possible under the existing procedure for consolidating these cross-actions in tort, for where complexity in the issues for trial might result, the court could order separate trials of counterclaims to the extent necessary to avoid confusion.

The adoption of the rule here urged, although permissive, would encourage the determination of all claims between the parties in one action. The existing rules are so restrictive and in many respects so doubtful in application that counsel is either definitely precluded from asserting some counterclaims or is so uncertain as to their permissibility that the easier course is to start independent actions. Since the proposed rule would preserve the objective of

<sup>138</sup> 90 W. Va. 166, 111 S.E. 501 (1922).

<sup>139</sup> *Id.* at 172, 111 S.E. at 503.

<sup>140</sup> 125 W. Va. on the sixth page (not numbered) in the report.

<sup>141</sup> Carlin, *A Decade of Pleading, Practice and Procedure*, 53 W. VA. L. REV. 1, 23 (1950).

existing restrictions, while removing the hardships possible under existing rules, no reason for not adopting the rule appears. In addition, its acceptance would be another step toward the general goal urged in this paper, namely, the avoidance of numerous actions where the claims between the parties may be settled in one action without prejudicing their rights.<sup>142</sup>

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<sup>142</sup> It has long been recognized that this was the goal of the set-off statute. *Baltimore & Ohio R.R. v. Jameson*, 13 W. Va. 833, 837 (1878). Procedural developments since that date have shown that the objective there sought may be broadened to include many additional claims in one action and with greater assurance that the rights of the parties will not thereby be prejudiced.